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OCTOBER TERM, 1956

No. 915

TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION, ET AL., *Petitioners*,

v.

IVAN RANGE, ET AL.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

APPENDICES TO PETITION FOR CERTIORARI

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(1) Opinion of the Chancellor, Chancery Court, Greene County, Tennessee

IN THE CHANCERY COURT FOR GREENE COUNTY, TENNESSEE

No. 6411

IVAN RANGE, ET AL.

VERSUS

TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION, ET AL.

[Filed August 24, 1954]

MEMO

The Tennessee Burley Tobacco Growers' Association was organized under the co-operative marketing laws of Tennessee on August 25th, 1941, and since that time has been active regularly and continuously. It is a non-profit association without capital stock. The purpose of the Tennessee Burley Tobacco Growers' Association as originally stated was:

> "To engage in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein."

The chief work of the Tennessee Burley Tobacco Growers' Association or its prime function since its organization has been to administer the loan support program as agent of the Commodity Credit Corporation of the federal government for the benefit of the farmers of Tennessee.

At the time of the filing of this suit there were approximately 76,000 members of the Tennessee Burley Tobacco Growers' Association. H. S. Duncan was and is at present and has for some time prior to the filing of the suit been secretary-treasurer and general manager of the association. There are eleven directors of the association. The Commodity Credit Corporation herein referred to was organized under the federal statutes and has been in existence for many years.

Since the organization of the Tennessee Burley Tobacco Growers' Association, the chief defendant herein, the association has grown and prospered and at the time of the filing of this suit had approximately $563,000.00 in cash on hand. This was for the most part equities from the sale of tobacco by the association.

This suit was filed by a small number of the members of the Tennessee Burley Tobacco Growers' Association who claimed to represent themselves and a total of 7,183 members who are farmers and tobacco producers. Since this is approximately 10% of the total number of members, we may refer to the complainants herein as the minority group and the others as the majority group. The complainants, however, have in argument and briefs insisted there are many more who desire to be represented as complainants.

Even though the association has prospered there has developed within the last few years an irreconcilable conflict between the minority group, represented by the complainants, and the majority group which includes the management and a majority of the directors. This has come about mainly because of the refusal of the defendant association and the management to pay to the farmers and members equities received by the association from the sale of tobacco for the years 1946, 1947, 1948 and 1949. It is not necessary here, it would seem, to set out in detail the methods of operation of the association or of the Commodity Credit Corporation in administering the loan support pro-

gram. Every substantial tobacco grower as well as business men, judges and lawyers are somewhat familiar with the procedure and all of us are familiar, at least in a general way, with the loan support program as administered by the federal government on tobacco and other crops. The detailed procedure is not in question and is not pertinent to the issues here.

Our Federal government has for many years been interested in seeing that the farmers, and especially tobacco growers receive a fair price for their tobacco. With that in mind the Congress created the Commodity Credit Corporation and the Commodity Credit Corporation deals with the various associations over the country which in turn deal with the farmers and warehouse men. Each year the Commodity Credit Corporation enters into a written contract with the organizations of the various states and communities which handle the loan support program and in Tennessee with the defendant Tennessee Burley Tobacco Growers' Association, setting out in detail the terms of making the loans to the association with which the association can guarantee that the farmers will receive the loan support price for tobacco.

For each of the years involved such a contract was entered into providing how the loans were to be made, how they were to be secured, repaid, etc. and each one of these contracts contained a provision substantially as follows:

> "All net gains accruing from the sale of tobacco upon which Commodity has loan funds under this agreement shall be distributed on a fair and equitable basis to growers by the association, unless a disposition of such gains other than by distribution by growers is requested by the association and approved by Commodity."

One of the two chief questions involved in this case can be determined by an interpretation of the foregoing provision of the contract.

Each of the approximately 76,000 members of the Association have paid the original membership fee of $3.00. In addition to that, each member who has sold tobacco has paid a certain amount to the association for the handling of the tobacco. There is no question but that these membership fees as well as charges for the handling of the tobacco belong to the association and after the cost of operation the remainder could be handled and disposed of as directed by the directors as they see fit so long as they stay within the by-laws and within the statutes of the state and the federal government.

For the years 1946, 1947, 1948 and 1949 there was a considerable amount of tobacco handled by the defendant association. Loans were made by the federal government under the loan support program and each of the farmers were paid the minimum price or the price set by the agents of the Commodity Credit Corporation and the tobacco so failing to bring the loan support price on the floor of the warehouse was held by the association after payment to the grower of the support price, until the association was able to sell it for a price usually more than the floor price and left an equity for the owners of the tobacco.

All of the tobacco for these years had been sold long before the filing of this bill and the minority group of stockholders insisted that their funds should be distributed to them in cash. The defendants herein do not believe that these funds should be distributed in cash but that said funds should be held by the association and used by it as a revolving fund. So, the question is, as finally admitted by counsel on both sides, can the association use these equities as a revolving fund or for the purpose of building and maintaining a redrying plant or should these funds be distributed in cash to the farmers? The answer to this question involves an interpretation of the provision in the contract herein before referred to.

In the final arguments counsel on both sides frankly admitted that it is the purpose of the association to build and maintain a redrying plant and to use part or all of

these funds for this purpose. This was not admitted so freely at the time the suit was instituted or for some time thereafter.

While the defendants insist that the complainants cannot take advantage of that provision in the contract between the Commodity Credit Corporation and the association, the Court is of opinion that it should be considered and is determinative of the main issue in this case if it can be properly interpreted.

The defendants admit in their brief that the word "distribution" can be used in more than one sense and can carry different shades of meaning. The complainants insist that there is no way the equities could be distributed except on a "cash basis". The lawyers, of course, disagree on this. In addition to that, each side has taken depositions of men who have been connected with the Commodity Credit Corporation at Washington and these men differ on the construction of this provision of the contract. Since the lawyers differ—and it is proper to state that they are among our best lawyers—and since the authorities from the Commodity Credit Corporation differ on the proper interpretation and since there is no precedent in Tennessee to follow; and since this Court cannot be certain as to the correct interpretation, the Court does believe that the proper solution is to decide the case upon the *equities* and the *justice* of the case without a strict interpretation of the provision of this contract.

When the association was organized it was understood that whatever equity the farmers had left after the sale of each year's crop would be paid to the farmers in cash. For the first few years this was done. The farmers believed and understood that the membership fee of $3.00 plus the other service charges would be sufficient to bear all of the expenses of the operation of the association.

It would not be equity or justice for the majority members of this association to take the funds that belong to the minority members over the objection of said minority group and put these funds into a redrying plant or to dis-

tribute the money in any way other than by cash. All the way through the contract of the Commodity Credit Corporation with the association and under all of the laws, both federal and state, it can be seen that the main purpose has been to protect the individual farmers in the growing and marketing of their tobacco. The association directors and their representatives have made many speeches to groups of farmers in which they told the farmers or led them to believe that their equities would be paid to them in cash; they have written letters to that effect; they have run advertisements to that effect. The defendant, H. S. Duncan, testified in this case that the money belonged to the farmers. Both the witnesses Gordon and Loos, former government representatives, testified the same, in effect. Some of our federal courts have held that these measures are intended primarily to benefit the producers. Certainly the ordinary farmer would construe this contract to mean that he had a right to his equity in cash. So, the just and equitable thing is for those farmers who desire to have their funds or equities paid to them in cash, to receive same in cash; and it would also be equitable and fair for those who desire to leave their money in the association as a revolving fund, or to use it for the building and maintenance of a redrying plant to do so, and the Court holds that this may be done.

The Court also holds that the association has the right to handle all of its monies as the directors see fit so long as it stays within the provisions of the by-laws and constitution and within the laws laid down by our state and federal governments, and the contracts between the Commodity Credit Corporation and the association and between the association and the farmers. But the equities held by the association belong to the farmers and not to the association. The association acts as the agent for the Commodity Credit Corporation in making the loans and the association holds the equities until the proper time for distribution as an agent or trustee of the farmers.

Such a distribution of the assets to the approximately 10% who desire their funds in cash will not hinder or deprive the others of the right to build and maintain a redrying plant or handling their funds as they see fit. If as the defendants claim, there is only about 10% of the farmers who desire the distribution of their equities in cash, it will still leave approximately 90% of the funds in the hands of the association, which is more than sufficient to build the redrying facilities.

This case is referred to the Clerk & Master who will determine and report:

(1) which members of the association desire to have their funds paid to them in cash, and

(2) which members desire to have their funds left with the association to be used as a revolving fund or as directed by the directors.

This may be done by letters to the various members, and replies mailed to the Clerk & Master.

The Court is not overlooking the marketing agreement between the farmers and the association, but even if these parties could disregard the contract between Commodity Credit Corporation and the association and go beyond its terms, the farmer-association contract did not contemplate using the equities to finance a redrying plant. Perhaps, by placing a strained construction on this contract, it could be so construed, but it must be interpreted in the light of all the facts and circumstances. The record is convincing that such was not the intention of the farmers at the time the contracts were signed.

The injunction heretofore granted will be modified to the extent that the association will pay to the Clerk & Master a sum sufficient to mail and print the letters. The association will also furnish the Clerk & Master a complete list of members with addresses. Other compensation of the Master will be reserved until further orders.

The Tennessee Association is the only agency handling the price support program for tobacco that does not recognize the obligation to pay the equities in cash. The Commodity Credit Corporation never at any time approved any distribution other than by cash.

By the original and amended bill, the complainants also seek a recovery from the defendants for illegal and improper use of the funds of the association and also seek to enjoin the association and its directors from expending money for any construction other than the buildings already started.

This Court cannot find that there has been such waste or mismanagement by the association or any officers thereof to justify a recovery. While it may be true that some of the expenses have been somewhat higher than most farmers would like, the Court cannot find and does not find that they have gone beyond the provisions as set out by the by-laws and the constitution or the law. These expenditures have been approved by the board of directors in the handling of $33,000,000.00, as has been done by this defendant association, it would be almost impossible to do so without finding some small item or items which were not handled perfectly. There is bound to be some discrepancies and irregularities. These discrepancies and irregularities were minor and do not justify a recovery against the defendants.

If either the complainants or the defendants, or both, desire an appeal, the Court will be inclined in its discretion to grant said appeal at this time, even before a reference.

Other than as herein before stated, the injunction is dissolved.

The costs of this cause will be paid one-half by the complainants and one-half by the defendants.

Many exceptions have been made by the complainants and the defendants to testimony. There is much argument in the record made by attorneys. To some of these excep-

tions the Court has noted its rulings. Others it has not. All exceptions not otherwise noted are overruled.

Decree may be prepared accordingly.

This *23rd* day of August, 1954.

S Geo R. Shepherd
George R. Shepherd, *Judge*, Sitting as Chancellor by Interchange and Designation.

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(2) Opinion of the Court of Appeals of Tennessee

In the Court of Appeals of Tennessee
From the Chancery Court of Greene County
Honorable George R. Shepherd, Judge, Sitting by Interchange as Chancellor
Eastern Section

Ivan Range, et al.

vs.

Tennessee Burley Tobacco Growers Association, et al.

OPINION

[Filed August 24, 1955]

McAmis, (P. J.)

This suit was instituted by eleven members of Tennessee Burley Tobacco Growers Association, a cooperative association, incorporated under the laws of Tennessee, against the Association and H. S. Duncan, its Secretary and General Manager, to stay alleged waste and to recover in behalf of complainants and "many hundred and thousands" of such growers for alleged waste already committed. A further purpose of the bill was to recover $563,000.00 representing the amount realized by the defendant Association from the sale of tobacco for the crop years 1946, 1947, 1948 and 1949 in excess of the amount borrowed from Com-

modity Credit Corporation to support the price of tobacco at 90% of parity on the auction markets of Tennessee.

The defendants answered the bill denying any acts of waste or mismanagement either past or prospective, asserting that the complainants named in the bill had no right to sue on behalf of other members or producers and that complainants actually represented certain segments of the tobacco industry, particularly warehousemen and redryers, described in the answer as monopolistic and desirous of forestalling threatened competition by wrecking the defendant Association. It was asserted that such interests were financing the suit and that the combined "equities" due complainants for the year 1946, for example, amount to only $84.28.

The answer admitted that, in order to better conserve the interests of its members, the defendant Association had constructed three storage warehouses and had a fourth under construction when the bill was filed. It was alleged that such acts are within its charter powers; constitute a proper exercise of such powers and in no sense, amount to waste or an illegal diversion of corporate funds as alleged in the bill.

As to the excess or "equities" realized from the sale of tobacco acquired under the Federal support program the separate answer of the Association contains the following:

> "... When a tobacco crop is sold, under the sales policies approved by Commodity Credit Corporation, the amount of the non-recourse loan against that crop is required to be paid in full together with interest. That has been done as to every crop that has been sold by this defendant. After that is done, the equities remaining on hand belong to the tobacco growers who had tobacco taken under loan. These tobacco growers, in almost every instance, are members of the Association, and it has been, and is, the attitude of the Association, that these members can do what they please with their money. They can either have it paid back in cash, or they can retain it in the hands of the Association and apply it to any purpose which they conceive

might be of advantage to the producers, and for the best interest of themselves and other tobacco producers."

Although not emphasized in the pleadings the right to retain what will hereinafter be referred to as equities seems to have been presented to the Chancellor as turning on a proper interpretation of the following provision of annual contracts between Commodity Credit Corporation and the Association:

> "All net gains accruing from the sale of tobacco upon which Commodity has loaned funds under this agreement shall be distributed on a fair and equitable basis to growers by the Association unless a disposition of such gains other than by distribution to such growers is requested by the Association and approved by Commodity."

The Chancellor found that complainants had failed to establish waste or mismanagement but that the Association had no right to withhold equities from producers. The latter holding is predicated on a finding that the Association had represented to growers when they became members that such equities would be distributed in cash upon repayment of the loan to Commodity Credit Corporation for each crop year and that it would be inequitable to allow the Association to intermingle such funds with its revolving capital for the purpose of constructing a redrying plant as proposed. In that view it was not necessary to resolve any ambiguity in the above quoted provision of the contracts.

Accordingly, the Chancellor directed a reference to the Master to determine the amount due each producer who had sold tobacco during each of the years 1945, 1947, 1948, 1949 and (under an amendment to the bill) during the years 1950, 1951 and 1952. The Master was directed to report the amount due each producer and determine by correspondence which producers elected to withdraw the amount due.

From this decree both complainants and defendants have appealed. Complainants insist that the Court erred in finding that no waste had been committed or was being threatened and in not permanently enjoining defendants from using any of the equities due producers in the construction of permanent facilities for storing and redrying tobacco. The Association's primary insistence here, as in the Chancery Court, is that under its contracts with Commodity Credit Corporation it can use the equities due growers as a part of its revolving capital for any purpose germane to the functions and purposes of a cooperative enterprise without the consent of Commodity Credit Corporation. It is insisted that "distribution" as used in the contracts is to be interpreted as that term is understood in cooperative enterprises and as defined by the Internal Revenue Bureau in fixing liability for income taxes, as between such enterprises and their patrons, upon savings resulting from such operations. Both complainants and defendants complain of the action of the Chancellor in dividing the costs and in requiring members and producers to communicate to the Master by mail whether or not they elect to permit the Association to retain and use the equities due them. It is insisted that this method is unwise, impractical and unwarranted in law and the Association, as an additional ground for reversing this action, insists in effect that complainants failed to establish a basis for maintaining their suit as a class action and that, at most, complainants should be permitted to recover only the equities due them as individual producers. If this latter insistence should be sustained, the reference would, of course, be limited to the amounts due complainants in their own right.

In addition to the construction of permanent facilities for the handling and storage of tobacco and the purchase of machinery, bookkeeping equipment and the like, complainants insist that excessive amounts have been expended in employing auditors and attorneys, per diem allowances and expenses of officers and directors, conducting an educational program designed to inform members of opera-

tions of the Association relative to growing, processing and marketing tobacco and in various other ways expending funds of the Association. In developing their insistence as to alleged waste, complainants in their proof have gone into great detail and conducted the most minute inquiry into such matters as the expense of dinner meetings and tips to waitresses at such meetings, the expenditure of a few dollars for a small present to the wife of the President of the Association, traveling expenses of the wife of the Manager on two or three occasions and the employment of unnecessary help on warehouse floors at times when no tobacco was being handled by the Association.

We find that the construction of permanent facilities and the purchase of machinery and equipment was approved by the duly elected Board of Directors of the Association in furtherance of its corporate purpose. Dinner meetings were held to discuss affairs of the Association as customary in such organizations. The undisputed evidence shows that an audit of the books and records revealed no dishonesty in the handling of funds of the Association.

In the absence of fraud or corruption or ultra vires activities, not here shown, the intrusion of a court of equity into the internal affairs of a corporation is generally not warranted. The stockholders have their remedy within the corporation if it engages in activities or pursues policies deemed inimical to the interests of stockholders.

> "The majority stockholders of a corporation have an undisputable right, in the absence of fraud, to manage the corporate affairs within the powers possessed by such corporation, and courts of equity will not, as a general rule, exercise jurisdiction at the instance of shareholders in a corporation to control or interfere in the management of the corporate or internal affairs of the corporation. They have no power to interpose their authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business as they may have in cash of a similar controversy arising

between the members of an ordinary partnership. Mere errors of judgment on the part of the officers or majority stockholders are not sufficient as grounds for the interference of equity at the instance of minority stockholders. The breach of duty by a corporation, authorizing equitable relief by a shareholder, does not refer to mere mismanagement or neglect of the officers or directors in the conduct of the corporate business. The courts do not interfere on these grounds; to authorize or to justify interference, there must be actual or threatened injurious acts ultra vires, fraudulent and injurious practices, abuse of power, or oppression on the part of the corporation or its officers which are clearly subversive of the rights of the minority or of a stockholder and which, without such suits, would leave him remediless." 13 Am. Jur. 498, Corporations Section 452.

Moreover, unless it appears that to do so would be an idle ceremony, stockholders cannot sue the corporation or its officers for the purpose of remedying wrongs alleged to have been committed without first having applied to the directors to interfere and have such wrongs abated. *Boyd* v. *Sims*, 87 Tenn. 771; *State* v. *Mitchell*, 104 Tenn. 336; *McCampbell* v. *Fountain Head R. Co.*, 111 Tenn. 55; *Peeler* v. *Luther*, 175 Tenn. 454.

In this case complainants failed to invoke the action of the Board of Directors and we do not find circumstances excusing their failure to do so. The proof shows no more than a division of opinion among stockholders and directors with the majority prevailing.

If complainants are correct in their insistence that equities arising from the sale of tobacco belong to the individual growers the relation between growers and the Association is that of debtor and creditor. It is not alleged that the Association is insolvent and there is no proof that it is about to become so. In the absence of such proof we are unable to see how complainants, as creditors, have any right to invoke judicial action affecting the internal affairs of the corporation.

We have concurred with the Chancellor in holding that waste and mismanagement are not established by the proof. We have further held that, in any event, complainants as stockholders have not invoked the action of the Board of Directors to abate any alleged wrongful or illegal conduct or to sue the officer responsible therefor in the name of the corporation and for that additional reason cannot maintain the present action as stockholders.

It results that any right to maintain the present action must be limited to the right of complainants, if any, to recover in their status as creditors equities arising from the sale of tobacco. In the absence of a showing of involvency, can they maintain a class action for the recovery of such equities? We think not for two reasons:

(1) The proof tends to show that a great majority of the 70,000 or more producers entitled to equities desire to leave them with the Association. As we understand, a resolution so providing passed at an annual meeting of the member stockholders. Similar resolutions were passed in county meetings and failed of passage in others. It is true any action taken at these meetings does not preclude individual members from asserting any property rights they may have to these equities. But to hold that complainants may maintain this suit for the benefit of members might well be contrary to their wishes. The bill states that 7,000 or more of the members had voted to empower a committee to employ counsel to bring this suit but there is no competent proof to sustain this allegation. (There is proof that one of the witnesses saw a list of names but whether they were producers is not shown.) Quite aside from this, however, each producer has his action unaffected by complainants and without relation to their claims. As shown by the answer above quoted, as well as by the proof, the Association admits that the producers own the equities subject only to its right to use them temporarily as a part of its revolving capital. There is no reason to assume that if the courts reach a contrary conclusion a multiplicity of

suits would be required due to refusal of the Association to pay on demand.

The situation is not unlike that involving depositors in a bank. A and B have deposits in Bank C which is solvent. Can A who wishes to sue for the amount due him maintain an action for B who wishes to leave his money in the Bank? Plainly, it could not be maintained that A could sue in a class action in such a situation.

(2) We think a court of equity should decline to entertain the present action as a class suit for the distinctly different reason that complainants are not in the true sense suing in behalf of other producers. Though complainants are shown to be entitled to equities, some are stockholders in warehouses while others are employees of warehouses. It is admitted that warehousemen who are not shown to be customers are conducting this suit and have employed and under certain contingencies have agreed to pay complainants' counsel. It is apparent that a conflict of interests between the warehousemen and the Association is, at least, conceivable. In the absence of some compelling reason to the contrary a court of equity, under such circumstances, should confine the recovery to the parties complainant.

> "In cases to which the doctrine of representation applies, and one of a few parties are permitted to sue and defend on behalf of many, care must be taken that a party or parties to the record fairly represent the interest or right involved, so that it may be fully and honestly tried. . . ." 39 Am. Jur. 922, Parties, Section 48.

On the other hand, we cannot follow defendants' insistence that complainants should be repelled from suing for the amounts due them as individuals because some, though not all, of them are interested in other enterprises with conflicting economic interests or because such interests are financing the suit. In the enforcement of their individual claims complainants have a right to accept aid from whom they please so long as champerty is not apparent.

The question of the right of the Association to use the equities as revolving capital with which to conduct its charter functions must be resolved in the light of the intent of the Congress in creating Commodity Credit Corporation and providing it with funds to support the price of certain selected commodities, including tobacco.

The purpose of the creating act is set forth in Section 714, Title 15, Federal Code Annotated, in part as follows:

> "For the purpose of stabilizing, supporting and protecting farm income and prices . . . there is created a body corporate to be known as Commodity Credit Corporation, which shall be an agency and instrumentality of the United States."

Title 15, Par. 714j provides:

> "The Corporation may, in the conduct of its business, utilize on a contract or fee basis, committees or associations of producers, producer-owned and producer-controlled cooperative associations and trade facilities."

Elsewhere the Act provides that the Corporation may enter into such contracts or agreements as may be necessary in the conduct of its affairs and that, with respect to such contracts, State and local laws shall not be applicable.

In brief outline, Commodity Credit Corporation since its creation has been supporting the price of tobacco by entering into contracts with cooperative organizations in the field. It then advances funds through loans to such instrumentalities with which they go upon the market and purchase tobacco which failed to bring, according to grade, 90% of parity. These loans, in turn, are secured by sales certificates and, as specifically provided by the Act, such loans are non-recourse loans. As a result, no loss can be sustained by the agencies carrying out the support program. Such agencies, however, may ultimately sell the tobacco pledged to Commodity Credit Corporation for more than the amount of the loan. The defendant Association

has now entirely sold the tobacco acquired for the years 1946, 1947, 1948 and 1949 and, after paying its indebtedness to Commodity Credit Corporation, expenses and one-half the excess realized from the sale of the 1946 crop, still has on hand approximately the sum of $563,000.00 mentioned at the outset of this opinion.

In 1950, the Association by action of its Board of Directors, as shown, paid in cash to producers one-half the equities for the 1946 crop and allocated on its books the balance due each producer. No further payments in cash have been made for succeeding years but, for such years as have been closed out, distribution by allocation on the books of the Association rather than in cash has been followed.

The governing contract provision for each year here involved has been substantially the same as that above quoted. Mr. Duncan, Secretary-Treasurer and Manager of the Association, testified that no request was ever made of Commodity Credit Corporation to distribute equities due producers by allocation rather than in cash but that he advised it by letter in 1950 or 1951 of the action taken as to the 1946 crop and that no objection was made to the retention of one-half the equities for that year.

The record reveals a consistent and continuous controversy over a period of years within Commodity Credit Corporation and within the Tobacco Branch of the Department of Agriculture as well as between the defendant Association and the Director of the Tobacco Branch, Mr. Thigpen, who appears to have taken the position that the words "in cash" should follow the word "distribution." Although, refusing to add a provision requiring distribution in cash, the responsible officials of Commodity Credit Corporation and, on appeal, the Secretary of Agriculture who, it appears, exercises supreme revisory authority over any action of Commodity Credit Corporation, assiduously avoided any official ruling upon the proper interpretation of the term "distribution". Likewise, although it must have been generally known that a dispute was raging as to the meaning of the term, no effort was made to have the

question put to rest by action of the Board of Directors of Commodity Credit Corporation. We can only assume that it was the intention of Commodity Credit Corporation and the Secretary of Agriculture to leave to the Courts the task of construing and applying the term. Certainly, if it had any clearly defined intent to require distribution in cash or, conversely, to permit the Association to retain and use equities as a part of its revolving capital, apt phraseology could have been found to accomplish its purpose.

If the question of a proper construction of the contract is to be viewed as turning finally upon the intent of Congress in setting up a statutory scheme for the aid of producers or at least against the background of such intent, as we think it must be, we find no contemporaneous, consistent and well-defined construction by officials charged with implementing the program which would be of aid in arriving at a satisfactory conclusion.

The doctrine that, in the construction of statutes, weight will be given to administrative construction is subject to the limitation that the courts will give only such effects to such interpretations as they deem appropriate, depending upon whether or not the construction has been frequent, general, uniform and contemporaneous and seemingly in harmony with some plausible construction of an ambiguous statute. 42 Am. Jur. 401, 402, 403, Public Administrative Law, Sec. 80, 81.

The legislative intent was to aid producers by securing for them at least 90% of parity for their products. In the case of tobacco the practice has been that the crop of each producer is graded by a Government agent according to quality and condition before it is offered for sale. In view of this practice of dealing with producers as individuals, it cannot be assumed that, because a grower is assured of receiving 90% of parity, it was intended that he is to be considered as having received the full value of his crop or that his property rights in any sum above parity would be, in any way, impaired. As demonstrated by the sales

of tobacco by the defendant Association it was to be expected that in many cases the tobacco would eventually bring more than parity price. And, as we have seen, the Association concedes all of this except that it now claims the right to hold payment of equities in abeyance until they can be replaced by equities arising from the sale of subsequent crops.

We will not lightly ascribe to the Federal Government an intent to benefit third parties at the expense of the grower who is the prime beneficiary of the Act even though such third parties may be other producers. It is true the Association intends to withhold the benefits only temporarily until other crops furnish enough capital to replace that withheld for a given year. But there is no assurance that there will ever be such replacement capital and; as we understand, the Association is claiming the right to judge when enough capital is available for the purpose, that, in turn, to depend upon the developing need for permanent facilities deemed by the Association to be beneficial to growers. And this right is claimed not only as to growers who are members of the Association but as to producers who are not members.

Whether it is true, as insisted, that there are abuses in the industry which can be remedied only by the collective action of growers is not within our province to determine. Our duty is to determine the rights of growers to claim the benefits of the Act, leaving them free to decide for themselves whether the benefits will be greater by laying the funds due them in the Association for the collective use of themselves and all other growers than by withdrawing them.

The contract is articulate as to what the Association is to receive for its service in carrying out the support program. If additional benefits were to accrue to it, it must be assumed that they would have been spelled out in plain terms and not left in doubt.

Any right of the Association to infringe upon the rights of growers must derive either from the Federal Govern-

ment which made possible the realization of a profit or from the grower whose crop the Association has sold. In our opinion it has not been able to trace its claim to either source. We think any grower reading the contract in advance of the sale of his crop would have concluded that "distribution" meant distribution in cash upon the liquidation of the crop for the year rather than allocation according to cooperative usage and custom upon the books of the Association. As to such grower's crop under its contract with Commodity Credit Corporation the Association was to act as an agent of the Federal Government and not in its capacity as a cooperative benefiting the industry as a whole.

We are unable to see how a ruling of the Internal Revenue Bureau defining the term "distribution" for the purpose of fixing liability for income taxes on savings, as between a cooperative and its members, can have any bearing on the present controversy. As pointed out, the Association as an agent of the Federal Government was not acting as a cooperative. Nor was it acting for its members as such. Its obligation was to act for the benefit of growers without regard to whether they were members of the Association and, in fact, many growers were not members. Moreover, as we understand, the ruling of the Bureau upon which the Association relies was not enunciated until after many of the contracts had been executed and largely, if not entirely, performed.

We have no doubt that Commodity Credit Corporation, in furtherance of the purposes of the Act and under the terms of the contract, could have authorized the Association to do all that it now claims the right to do with the equities due growers. As yet, however, it has not been asked to grant the Association such rights and we cannot infer such a grant from the mere fact that it continued to appoint the Association from year to year and made no objection as to the allocation of one-half the 1946 equities when advised of that action in 1950 or 1951. As shown, knowing of the controversy, it avoided any official ruling

on the question. The question was one of policy calling for action by the Board of Directors subject to approval by the Secretary of Agriculture and an intent to deprive the growers of rights otherwise due them should not be implied along from the circumstances shown. The contract contemplates affirmative formal action in the form of a request by the Association and approval by Commodity Credit Corporation in the light of current needs and all relevant circumstances.

It is appropriate here to say that there was no prejudicial error in the refusal of the Chancellor to grant a rehearing to enable the Association to show by the Federal Register of 1954 that the then Secretary of Agriculture had ruled that "in cash" should not be inserted in contracts with Commodity Credit Corporation. If the Secretary intended to hold by this action that the Association may allocate the equities rather than pay them in cash, except as to claims of complainants as individuals which will now take the form of a judgment, we know of no reason why the Association may not yet request and obtain an official ruling from the Commodity Credit Corporation and, if adverse, invoke the action of the Secretary.

If counsel are unable to agree, the cause will be remanded for the purpose of determining the amounts due complainants as individuals both under the original and amended bills. We find no basis for taxing the defendant Duncan personally with any part of the costs since no relief was granted as to him. We assume this was an inadvertence. By far the greater portion of the costs of suit was incurred by the attempt of complainants to show mismanagement and waste by the Association. We feel that the greater portion of this testimony was wholly irrelevant on that issue upon which complainants were unsuccessful, resulting in a record of nearly 3,000 pages of testimony. Three-fourths of the cost of $1,400.00 for making up the transcript will be taxed to complainants and one-fourth to defendant Association and sureties on the respective appeal bonds. Remaining cost of appeal and all costs of the Chancery

Court as decreed by that court will be equally divided between complainants and the Association.

(Signed)

S McAmis

McAmis, *Presiding Judge*

Concur:

S Hale, *J.*

S Howard, *J.*

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(3) Opinion of the Court of Appeals of Tennessee on Petition for Rehearing

[Caption Omitted]

ON PETITION TO REHEAR

By their respective petitions to rehear both parties complain of our holding that the relationship between producers and the Association is that of debtor and creditor.

Complainants insist that the equities due producers are held in trust by the Association and, for that reason, we erred in not sustaining the suit as a class action. The Association insists that the equities constitute savings which, under cooperative practice, are subject to be withheld and used as revolving capital. Upon further reflection, we are constrained to adhere to our original conclusion that such equities constitute nothing more than an indebtedness of the Association:

The contracts of the Association with Commodity Credit Corporation created the relationship of principal and agent between them—not between the Association and producers. Under these contracts the Association became obligated to perform certain duties in furtherance of the purpose of Commodity Credit Corporation and the intent of the Act to aid producers. Incident to the performance of its contractual duties, and without any contract or agreement with individual producers, the benefits of the Act, to the extent of the equities here involved, found their way into the hands

of the Association. The producers, as the prime beneficiaries of the Act and third party beneficiaries of the contracts between Commodity Credit Corporation and the Association, are, therefore, mere creditors of the Association. The fact that the Association was acting as an agent of Commodity Credit Corporation does not impress the funds in its hand with a trust in favor of growers.

But, if we are mistaken in this view and the relation is that of trustee and *cestui que* trust it would seem that it, as we have held, complainants are not in the true sense representative of other thousands of growers entitled to equities, the same reasons would exist for declining to entertain the suit as a class action.

We said in our original opinion that warehousemen having at least possible conflicting interests were active in the conduct of the suit and obligated to pay fees of complainants' counsel. In part, the basis of our statement that this was "admitted" was the following testimony of Mr. W. G. Vann, a warehouseman:

> "Q. Did you procure some of the complainants to this bill?
>
> "A. No, sir. You mean the original bill?
>
> "Q. Yes.
>
> "A. Yes, I did.
>
> "Q. And in response to that request, some of them did?
>
> "A. They were willing after my request, they did sign it.
>
> "Q. Mr. Stephens was one that signed it at your request?
>
> "A. He was one of them. (Tr., p. 721.)
>
> "Q. You have conferred with Mr. Parvin, attorney for complainants here?
>
> "A. We didn't plan it, but conferred with them since.
>
> "Q. You fellows have paid the bills and the cost of this lawsuit, haven't you?
>
> "A. We have not.
>
> "Q. You knew he did employ, somebody did employ Mr. Joe Henry and his associate, certified public ac-

countants to come to the office of the Burley Tobacco Association and search the record?

"A. Yes, sir.

"Q. You paid your part?

"A. No, sir, I haven't paid my part.

"Q. You know you are indebted for it, don't you?

"A. Not necessarily. We warehousemen agreed to help the farmers along with anything that might come up.

"Q. That includes financing it.

"A. If they win the suit, the attorneys fees, part of it, the biggest part of it will come out of the amount allowed by the Court.

"Q. If they don't win the suit?

"A. I voluntarily agreed to pay my part. If I paid for advertising for farmers to advise them over the years, I can surely go along with them at a moment like this.

"Q. Who else besides you have volunteered to pay for it?

"A. I think maybe 75% of the warehousemen." (Tr., pp. 734, 735.)

There is other evidence of activity by the warehousemen too long and involved to here set out tending to the same conclusion.

It may be true as insisted that warehousemen helped in the creation of the Association and that its continued existence is not altogether contrary to their interests. A conflict lies, however, in the fact that the Association favors co-operative warehouses and redrying plants and it must be remembered that a primary purpose of the bill was to enjoin the use of funds in such enterprises. We are, therefore, of opinion a court of equity should decline to entertain the suit as a class action especially when to do so would force the Association to operate under the cloud of a possible judgment so large as to seriously jeopardize its credit. Aside from this, we think producers who wish to withdraw their equities can do so with greater facility and at less expense by making demand upon the Association than by coming into court to formally claim the benefits of this suit.

We are content with the taxation of the cost of making up the transcript as directed in our former opinion. Complainants' petition to rehear is, accordingly, denied.

The Association's petition to rehear erroneously assumes that under our former opinion a cooperative cannot place savings due its members in a revolving fund and devote such savings to the operation and advancement of the cooperative enterprise. That question was not presented once we concluded that, in acting under its contracts with Commodity Credit Corporation, the Association was not acting in the role of a cooperative but as an agent of Commodity Credit Corporation. For the reasons above set forth we hold that such equities are debts of the Association and, therefore, cannot be classed as "savings". For the same reason marketing laws and agreements are inapplicable.

The Association's petition mistakenly assumes that we held that the Chancellor was correct in raising an estoppel against it. Having held that the equities constitute indebtedness of the Association rather than savings due members it was unnecessary to determine the correctness of the Chancellor's holding that the Association had represented to prospective members that their equities would be distributed in cash.

The foregoing determines in principle other questions raised by the Association's petition to rehear. It must, therefore, be denied.

(Signed)

McAmis
Presiding Judge

Concur:

Hale, *J.*

Howard, *J.*

(4) Opinion of the Supreme Court of Tennessee

IN THE SUPREME COURT OF TENNESSEE

GREENE EQUITY. HONORABLE GEORGE R. SHEPHERD, SITTING BY INTERCHANGE AS CHANCELLOR

ON PETITIONS FOR CERTIORARI FROM COURT OF APPEALS

IVAN RANGE, ET AL.,

Complainant Petitioner,

vs.

TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION, ET AL.,

Defendant Petitioner.

OPINION

(Filed September 3, 1956)

The respective opinions of the Chancellor and Court of Appeals sufficiently state the evidence material to a determination of the questions made by the two opposing petitions for certiorari. It will be sought here to avoid repetition of that evidence, except in so far as necessary in determining what disposition this Court should make of these petitions.

One petitioner, Tennessee Burley Tobacco Growers' Association, is a non profit, and without capital stock, farmers' Co-operative organized to market, etc., the crops of its members. There are certain fixed charges for those services, as well as a life membership fee. It has about seventy seven thousand (77,000) members.

The Federal Government has enacted legislation, and therein provided funds, for the purpose of assuring farmers an adequate price for their crops. This is accomplished by means of a non-recourse loan to each farmer of his crop equal to 90% of a fixed price called "parity". Responsibility for the carrying out of this program is placed by Congress upon that federal agency known as Commodity Credit Corporation.

Commodity Credit Corporation may directly administer this program in the various states, or any of them, or it

may contract with an organization in a given state for the administration of that program in that, or another, state for the benefit of the farmers. By way of illustration, it did contract one year with the Kentucky Tobacco Co-operative for the administration of the Burley tobacco loan program in Tennessee. It may, if it so desires, contract with an agency other than a farmers co-operative to administer the loan program in a given state, if such other agency will agree. It must be administered in each state for the benefit of all eligible growers of the crops involved, whether such growers are, or not, members of the organization administering the program. To illustrate, there are eligible growers in Tennessee of Burley Tobacco who are not members of the Tennessee Burley Tobacco Growers' Association. However, that association, in administering the loan program for the benefit of the Tennessee tobacco growers, must handle the crops of non-members, if such non-members so desire.

The agency administering the loan agreement program receives the crop upon which it is administering the program by consignment from the respective growers. It then sells this crop at such time as seem to it to be for the growers' best interest. After all the crops thus received for a given year are sold, and the loan of Commodity Credit Corporation repaid, and all expenses incident to a proper and reasonable marketing, any surplus belongs to the respective growers to be distributed to them in proper proportions, called "equities".

The Tennessee Burley Tobacco Growers' Association, by reason of its contract with Commodity Credit Corporation, administered the tobacco loan program for Tennessee Burley tobacco growers for the years 1946-1949, inclusive. By the close of the year 1952 it had marketed all of these crops. After paying the amount due on the loans of Commodity Credit Corporation, and all expenses incident to marketing, there remained a profit of some $563,000.00. It is agreed on all sides that this profit belongs to the growers whose crops were thus sold.

Approximately $300,00 of that profit belongs to the eleven (11) persons who commenced this suit against the Tennessee Burley Tobacco Growers' Association for the purpose of procuring a decree requiring the payment thereof in cash to each of them in accordance with their respective equities. They also seek to maintain the suit as a class action for the benefit of the many thousands to whom belong in individual amounts the aforesaid equities in this total net profit.

The Tennessee Co-operative desires to use this money for the erection of a tobacco re-drying plant and perhaps other plant facilities. Its plan is to pay the aforesaid profits in some future year or years to those to whom the aforesaid equities belong. It plans to pay them out of the profits on future crops of these or other tobacco producers if there be such future profits. It says in justification of this announced course of action

> "that the withholding of equities, by cooperatives, by action of the Board of Directors, the passing of said equities to reserve accounts, and the use of said equities in a revolving fund system of financing, for capital purposes, by the cooperative, was an almost universal, and very desirable and necessary practice."

However that may be, the Tennessee Burley Tobacco Growers' Association did not administer this program for these years under the authority of its prerogatives as such co-operative. It administered such programs as the agent of the Commodity Credit Corporation; necessarily, therefore, under the terms of its contract with that corporation. Therefore, the Chancellor and the Court of Appeals correctly gave effect to that contract in determining the aforesaid issue; and, in so doing, it was necessary to construe any ambiguous material terms of that contract which were in dispute.

The controlling provision of that contract on the issue stated—and it seems to be so conceded on all sides—is as follows:

"All net gains accruing from the sale of tobacco upon which Commodity has loaned funds under this agreement shall be distributed on a fair and equitable basis to growers by the Association unless a disposition of such gains other than by distribution to such growers is requested by the Association and approved by Commodity."

The eleven tobacco growers, who are complainants, contend that the word "distributed" as used in the above-quoted contract provision means a distribution in cash when a different distribution is not "requested by the association or approved by Commodity". Such "different distribution" has not been approved by Commodity.

The insistence of the co-operative, on the other hand, is "that the word 'distribution', as used in cooperative language, was generally regarded as meaning, and did mean, 'distribution, either in cash, or in non-cash forms.'" It then enumerated several non-cash forms, including allocation of the equity of each member upon the books of the association with notice to each member of such action given him so as to create a capital via revolving fund. Its statement is that it has made such allocation and given such notice; that in so doing it has complied with the above quoted provisions of the contract with Commodity Credit Corporation; that, therefore, it need not request, nor procure the approval of Commodity, other than to inform it of this action. This position is upon the theory that such action comes within the meaning of the word "distributed", as used in this contract.

Of the approximately 2850 pages of evidence a great many are consumed with testimony as to the meaning of the word "distributed" as used in the heretofore quoted provision of the contract.

The officials of Commodity Credit Corporation having to do with the marketing of this tobacco and others are in hopeless disagreement as to the proper interpretation to be given this word as so used. Some agree with the interpretation of the co-operative. Among these is the lawyer

who was the solicitor of the Department of Agriculture during part of the period involved. Others, including a former director of the marketing division, agree with the insistence of the eleven (11) original complainants. The Department of Agriculture has not officially taken any position.

In this plight of the case the Chancellor said that since he "cannot be certain as to the correct interpretation" and since "there is no precedent in Tennessee to follow" he proposes "to decide the case upon the equities and the justice" thereof. He concludes that equities and justice require a distribution in cash under this provision of the contract as to such of the growers as want their equities so paid to them, the Commodity Credit Corporation not having approved a different disposition thereof.

The Court of Appeals commented upon the fact that Congress intended the tobacco growers to be the prime beneficiary of the act, and that the Court could "not lightly ascribe to the Federal Government an intent to benefit third parties at the expense of the growers", as might reasonably be the case if there is applied the construction insisted upon by the co-operative. It further observed that the obligation of this association "was to act for the benefit of growers" without regard to whether they were members of the association, and that in fact many such growers were not members. It thus construed the word "distributed" as used in the heretofore quoted provision of the contract to mean a distribution in cash to the members of their respective equities in the absence of approval by Commodity of a different distribution. It, therefore, sustained the action of the Chancellor in directing the payment in cash to these eleven complainants of their respective equities.

The quoted provision of the contract is correctly recognized by the litigants and their lawyers as being ambiguous in meaning, as evidenced by each submitting much parol evidence as to the situation and surrounding circumstances in support of their respective insistences as to its true

meaning. This being the case, the meaning of the provision in controversy, and its word "distributed" is "a mixed question of law and fact to be submitted to a jury" in a jury case. *Bank & Trust Company* v. *Boyd*, 164 Tenn., 376, 385; hence, in a chancery non-jury case to be decided by Chancellor and Court of Appeals as those Courts decided any other controverted questions of fact.

The fact finding by the Court of Appeals as to the proper construction of the ambiguous word as used in the contract provision mentioned is a finding supported by an abundance of material evidence. If that finding be called a conclusion or inference from the evidence it is, nevertheless, a fact conclusion or inference reasonably drawn therefrom; thus as conclusive on this Court as the decision of any other question of fact when presented by petition for certiorari. *Conaway* v. *New York Life Insurance Company, et al.*, 171 Tenn., 290, 294-295. Thus the question which remains is as to how conclusive upon this Court is that Court of Appeals finding of fact or inference, if it be termed as inference.

Search for the answer to this question inevitably focuses attention upon the finding or conclusion of the Chancellor, because the findings of the two Courts, if in conflict, give this Court jurisdiction in a certiorari case to consider the question *de novo*, the question having been saved by proper assignment of error.

The conclusion of the Chancellor was the same as that of the Court of Appeals, reached by a different course of reasoning. He thought that "the equities and the justice" of the matter required that conclusion. So it is that his fact findings are not in conflict with those of the Court of Appeals as to the construction of the ambiguity mentioned. What jurisdiction of this converted question of fact does this Court have under those circumstances when the question is presented to it by petition for certiorari complaining of the findings of the Court of Appeals?

This Court went over that question in *Miller* v. *Kendrick*, 153 Tenn., 596, and concluded (598) that "a conflict in the

findings of the Chancellor and of the Court of Appeals must appear before this court is permitted to question a finding of fact made by the latter court." See also *Gaskin v. East and West Insurance Company*, 166 Tenn., 405, 408-409. The reason for this rule is stated in detail in *Hibbett v. Pruitt*, 162 Tenn., 285, 290-292, and *McCalla, et al. v. Rogers, et al.*, 173 Tenn., 239, 242, wherein the purpose of creating our Court of Appeals is so clearly stated. Conclusive upon this Court, therefore, is the construction placed by the Court of Appeals upon the ambiguous provision in the contract between Tennessee Burley Tobacco Growers' Association and Commodity Credit Corporation.

It results that all assignments of error which complain of the action of the Court of Appeals in sustaining the claims of the eleven (11) complainants as to their rights to be paid in cash their respective equities in the profits of the tobacco crops in question must be overruled.

The eleven (11) individual complainants sought to maintain this suit as a class action for the benefit of every individual who owns equities in the profits involved. It is not quite clear as to just what the Chancellor did hold as to this, further than that any one of this large class who desired to withdraw his or her equities in cash is entitled to do so. The Clerk & Master was directed to take action for the ascertainment of their desires. Perhaps, in practical effect, this amounted to a sustaining of the bill as a class action.

The Court of Appeals held that the decree "should confine the recovery to the parties complainant," and declined to sustain it as a class action for reasons not discussed (and probably overlooked) by the Chancellor. Certiorari petition of these eleven complainants attack this holding.

It is to be gathered from a reading of the record that the operation of warehouses in which tobacco is stored until it is resold after consignment to the agent of the Commodity Credit Corporation is a rather profitable business, and that the re-drying of such tobacco is likewise a source of considerable profit to the operators thereof.

These premises considered, the Tennessee Burley Tobacco Growers' Association had in fact constructed probably three warehouses, as we remember the evidence, and had in mind the construction of a re-dryer plant. Such acquisitions were to be financed by the use of the profits, in so far as necessary, derived from the sale of the tobacco crops mentioned, used as a revolving fund as heretofore explained. Its purpose was to furnish the tobacco producers more convenient and efficient services at less cost.

These plans, when consummated, would have the effect of bringing this Tennessee Tobacco Co-operative in competition with individuals engaged in the storing and redrying of tobacco. The fight between the two has already resulted in the tobacco crop being handled one year by the Kentucky Association.

The record justifies the conclusion that the eleven complainants, or some of them, were interested in storage warehouses, or re-drying plants and that they were being generously cooperated within the prosecution of this suit by warehousemen and re-dryers. So were several of the witnesses introduced by these complainants.

The opinion of the Court of Appeals quotes the testimony of one warehouse owner (Mr. Vann) to the effect that the operators of these facilities understood themselves to be obligated for the payment of the expenses of the suit in the event the eleven complainants were cast therein. The opinion might also have referred to Mr. Russell, a warehouse owner, who testified that the warehouse organization as a whole, according to his understanding, would pay all expenses of the lawsuit if the complainants lost the case. (See record, pages 2420-2423). It was to come out of the $563,000.00 if their insistences prevailed.

In view of this possible conflict of interest between the tobacco growers as a whole and those prosecuting this suit, it was the opinion of the Court of Appeals that a Court of equity "should confine the recovery to the parties complainant" upon the principle that it is a must that the "party or parties to the record fairly represent the inter-

est or right involved", citing 39 American Jurisprudence, 922, Parties, Section 48.

The text of *62 Corpus Juris Secundum*, page 920, and citing precedent therefor, is, to quote, "class action should be closely scrutinized and permitted only in clear cases". Other such decisions in support are cited in 1956 Cumulative Annual Pocket part of *Corpus Juris Secundum*.

The eleven complainants say that they are authorized to represent some 7,000 tobacco growers. The Court of Appeals did not think that this assertion was established by the proof. The record does establish the fact that thousands of tobacco growers in this association have expressed a desire for these equities to be retained as a revolving fund, thereby expressing their hostility to this suit sought to be maintained as a class action. The Chancellor calls those the "majority group". It is said in the text last mentioned, page 927, that in such a situation "a representative action cannot be maintained on the ground of the impracticability of joining them because of their number."

It was the duty of the Court of Appeals to independently find and consider the facts in connection with this class action proposal. *Hibbett* v. *Pruitt*, *supra*, page 290.

There is an abundance of evidence to sustain the Court of Appeals' conclusion on the point. It was not, therefore, an abuse of discretion upon its part to reject this suit in so far as it was brought to be maintained as a class action.

The original complainants also insist that the Court of Appeals erred in taxing three-fourths of the costs of making up the transcript to them because of their unsuccessful attempt, as found by both Courts, to show mismanagement and waste by the association, and in which effort there was used a very predominant portion of the record. This concurrent finding against the charge of waste and mismanagement is supported by material evidence.

We think, too, that the Court of Appeals was justified in concluding that quite a predominant portion of the record was consumed in undertaking to sustain this charge.

Hence, we are not able to conclude that there was any abuse of discretion upon the part of the Court of Appeals in so dividing the costs.

The certiorari petitions make other assignments of error, but they are incidental to that which has been determined herein, and thereby *per se* overruled, or become unimportant. Hnce, there is no necessity for a discussion thereof.

Both petitions for writ of certiorari will be denied.

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(5) Opinion of the Supreme Court of Tennessee on Petition for Rehearing

[Caption Omitted]

OPINION ON PETITION TO REHEAR

[Filed December 7, 1956]

The Association's petition to rehear suggests that errors which it thinks have been committed are due in part to its "oversimplification of the issues". The Court assures petitioner that the very able presentation made in its behalf is not subject to this criticism. Its insistences have been clearly and understandingly stated, and ably advocated.

Petitioner renews its insistence that the decision of the Court of Appeals was predicated on a misconstruction of the applicable federal statute.

In support of its contentions with reference to the borrowing of the profits, called equities, of the tobacco growers, and using the same for the purposes of the Co-operative, petitioner has referred to, and, as one justification for such action, relied on certain Tennessee laws which it says authorizes it, as a cooperative, to do this.

The opinion of the Court of Appeals notes that the federal statute makes inapplicable state laws to the contract involved here. This federal statute makes state laws inapplicable to the extent that they are inconsistent with that contract.

While the Court of Appeals does not make note of the "inconsistent with" proviso of this federal statute, it seems clear that it did not regard the Tennessee statutes relied upon by the petitioner as pertinent for the reason, as stated in its opinion, that petitioner is acting as an agent of the Federal Government, rather than in its capacity as a cooperative, in performing the contract. This Court agreed.

It is true that there was no concurrent finding of the Chancellor and Court of Appeals as to the proper interpretation of the controversial clause of the contract. Based on that fact, petitioner thinks that this Court should have proceeded, *de novo*, to construe that provision, if its meaning be ambiguous, though the petition denies the existence of any ambiguity.

It is also true that the Chancellor and Court of Appeals did not disagree as to such interpretation. The Chancellor just said he didn't know for sure what it meant therefore, was going to decide it "upon the equities and justice" of the controversy.

This Court's opinion called attention to that fact, and then observed, as it had to, if it was to respect precedent, that, since the construction placed upon the controversial clause by the Court of Appeals is supported by an abundance of evidence, "a conflict in the findings of the Chancellor and of the Court of Appeals must appear before this Court is permitted to question a finding of fact made by the latter Court", quoting from *Miller* v. *Kendrick*, 153 Tenn., 596, 598. There might have been added the further appropriate quotation from that decision that "... a Review of the facts by this court is only permissible to the extent that the findings of the lower Courts are shown by the record to be contradictory."

The insistence made by the petition that there is no evidence to support the interpretation placed by the Court of Appeals upon the controversial clause is apparently based on petitioner's assumption that such interpretation is supported only by the evidence of witness Gordon, and the fur-

ther assumption that his testimony is incompetent, as well as Gordon being, so the petition says, a thoroughly impeached witness.

The fact that Mr. Gordon did not elect to deny contradictory testimony given by some witness for the petitioner is a fact that does not take his testimony out of the record, and the fact that the acts of petitioner questioned by this lawsuit took place before Gordon became one of the top officials in the department of agriculture does not, as this Court views it, render incompetent his opinion based on his experiences and observation of the "tobacco trade", "*modus operandi*", etc. and circumstances familiar to him, and which lead him to a certain conclusion as to the proper meaning of this clause.

Other witnesses in and out of the Agricultural Department, and qualified to speak on the subject, placed upon the controversial clause the interpretation subsequently declared by the Court of Appeals, for instance, Mr. Stanton, who was secretary-treasurer and manager of the Kentucky Tobacco Growers Co operative, a much larger organization, as we understand it, than the petitioner association, and which represented Commodity Credit in Kentucky and elsewhere, thought that the word "distribute" as used in the contract means "in cash" except when Commodity Credit officially approved a request for a different manner of distribution of the growers' quities.

Petitioner's present insistence of an absence of ambiguity in this controlling provision of the contract seems inconsistent with its conduct in taking a large volume of evidence to prove that its interpretation of this clause is Correct, rather than the interpretation placed upon it by the respondents, original complainants, and their witnesses.

Be that as it may, witnesses qualified to speak on the subject disagreed as to what is the correct interpretation of this provision. Mr. Thigpen, a high official in the agricultural department, regarded as "controversial" the true meaning of the clause. The Chancellor said that he was

uncertain "as to the correct interpretation"; hence, would "decide the case upon the equities and the justice of" it.

This Court's opinion quotes the language of the contract clause in question. Repetition here is not necessary. As this Court views it, there is hardly an escape from the conclusion that the true meaning of that language is ambiguous, "and its construction depends upon other and extrinsic facts in connection with what is written"; thus, mixed question of law and fact. *Bank and Trust Company* v. *Boyd*, 164 Tenn., 376, 382.

Finally, it is insisted by petitioner that in any event judgment for complainants could not include any net savings from the 1946 crop because the distribution thereof "part in cash and part in non-cash form was approved by Commodity Credit Corporation". The petition cites page 2247 as authority for this statement of fact.

The record at that page shows that when Mr. Duncan was asked as to whether his association "did get approval from Commodity Credit for" the allocation on the books of $120,000.00 of the 1945 crop profits, his reply was "yes, I recall there was a letter from them saying that they had no objection to that, yes sir. I would assume that would constitute approval". We do not find such letter in the evidence.

Mr. Duncan also inferred the approval by Commodity Credit of the Association's withholding of these profits from the growers by the fact that Commodity Credit continued to renew the contract from year to year after being notified of the manner in which the Association was handling these profits. (Tr., pp. 2243-2245.) But, when asked if his association has ever made "any request for approval of Commodity Credit Corporation of the action that you (The Association) took in that respect" his reply was "not to my knowledge, Mr. Michael". (Tr., pp. 2722-2723.)

The Court of Appeals in holding that the above mentioned evidence did not constitute approval of the allocation upon the books of a part of the 1946 profits said this:

"As shown, knowing of the controversy, it, (Department of Agriculture) avoided any official ruling on the question. The question was one of policy calling for action by the Board of Directors subject to approval by the Secretary of Agriculture and an intent to deprive the growers of rights otherwise due them should not be implied alone from the circumstances shown. The contract contemplates affirmative formal action in the form of a request by the Association and approval by Commodity Credit Corporation in the light of current needs and all relevant circumstances."

This Court can find no reasonable basis upon which to rest a disagreement with this conclusion of the Court of Appeals in view of the fact that the contract expressly provides for distribution in cash, as we construe the word "distribute", unless a different disposition "is requested by the Association and approved by Commodity".

While that which has just been stated is conclusive of the insistence now under discussion, it is, perhaps, not amiss to observe that the Association's then attorney, Mr. Pepper, wrote Mr. Duncan that he was endeavoring to get the approval by Commodity Credit Corporation of the action taken by the petitioner Association with reference to the 1946 profits. (Page 184 of Exhibits.) Mr. Pepper, though present during the taking of some of the proof, was not called by the petitioner, Association, as a witness. The legitimate inference therefrom is that he was unsuccessful in his efforts to procure the necessary approval.

The petition to rehear will be denied.

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(6) Opinion of the Supreme Court of Tennessee on Second Petition for Rehearing

[Caption Omitted]

OPINION ON SECOND PETITION TO REHEAR

Permission to file this second petition of Tennessee Burley Tobacco Growers' Association to rehear was granted. Its author seems to be of the opinion that (1) a new ap-

proach to petitioner's insistences by way of a new argument is presented, and (2) a material fact has been overlooked by this Court.

The petition refers to a "marketing agreement" which petitioner, as a cooperative, has with its members, and which it says antedated Commodity Credit Corporation's contracts for the years involved. The petition quotes rather copiously from this agreement in support of its insistence that it has by virtue of such agreement the legal right to dispose by allocation upon its books, etc., of the profits, called equities, on the tobaccos involved.

The petition also repeats its insistence with reference to the authority given it as a co-operative by the Tennessee statute when not in conflict with the Federal statute involved here.

The Tennessee Burley Tobacco Growers' Association did not receive these crops by reason of such marketing agreements with its members. Nor did it market these crops by reason of any authority the Tennessee statutes may have given it as a co-operative. On the other hand, as heretofore (necessarily, in our opinion) concluded, it received these tobaccos from the respective growers as the agent of Commodity Credit Corporation and under the terms of its contract with that concern. Under this, our view of the matter, these marketing agreements and State statutes were not regarded as being of any consequence in determining the issues involved.

As we understand the petition, it renews petitioner's insistence that Commodity Credit Corporation approved the disposition made of the moneys received from a sale of the 1946 crops and, in support, refers again to certain pages of the record. In response to the first petition to rehear we discussed this matter in some detail. There is nothing we can add to that discussion. Petitioner, in our opinion, is simply mistaken in its conclusion.

The petition expresses the fear that certain expressions in our opinions heretofore filed may be construed as a modification of the holding of the Court of Appeals in Er-

tain matters and, therefore, potentially prejudicial to this petitioner. Since thtis Court declined to take jurisdiction, the result necessarily is that it has not modified the opinion of the Court of Appeals. Our opinions were intended only for the purpose of stating why we denied the petitions for certiorari.

This second petition to rehear will be denied.

APPENDIX B

DECREES AND JUDGMENTS BELOW

(1) Decree of the Chancery Court of Greene County, Tennessee

[Caption Omitted]

DECREE

[Entered September 17, 1954]

This cause has heretofore been submitted to the Court upon the record and briefs of counsel, and after due consideration, for the reasons set out in the memo opinion filed herein on the 24th day of August 1954, which is referred to and maded a part of the record herein, the Court is of the opinion and finds.

1—Tennessee Burley Tobacco Growers, Association (hereinafter referred to as Association) is a corporation, organized and existing under the laws of the State of Tennessee, and having the general powers given to it by Statute as a cooperative Association. It has been administering the loan support program as agent of the Commodity Credit Corporation for the benefit of farmers of Tennessee over a period of years.

The Commodity Credit Corporation is a corporation organized under the laws of the United States and is generally charged with supporting the price of agricultural commodities on a parity basis under the laws of the United States, and in doing this it has for many years, entered into contracts with Associations and various other organiza-

tions and instrumentalities throughout the United States for administering the loan support program in behalf of farmers and producers. This contract has been executed between Commodity Credit Corporation and the Association in behalf of tobacco growers for Tennessee, and surrounding territories over a period of years. The contract so entered into specifies the amount of the loan that can be made to the Tennessee Association for benefit of the farmers on tobacco, the methods of handling the tobacco, the cost of servicing and the amount of the loan is secured by warehouse receipts on the producers tobacco which has been handled under the support program for each particular year. Such loans are non recourse and if loss is sustained for any year, it is not borne by the farmers or producers.

2—In the particular situation here involved, the tobacco when it fails to bring the support price on the Tennessee warehouse floors when offered for sale at auction is consigned to the Association and handled under the loan support program by the Association as agent under the contract with Commodity Credit Corporation. The tobaccos are packed in hogsheads and stored in warehouses awaiting sale. Warehouse receipts are issued against the particular tobaccos and are pledged with Commodity Credit Corporation, or its agent, to secure the money advanced against such tobaccos under the loan contract.

3—For the years 1946, 1947, 1948, and 1949, the Association has handled a considerable volume of tobacco under the loan support program and all of the tobaccos for these years have been sold. After repayment of the loan and expenses of handling the tobacco and at the time of the filing of this suit, the Association had approximately $563,000.00 in cash on hand, representing equities arising from the handling of the tobacco for these years.

An irreconcileable conflict has arisen between some of the farmers, or producers of the tobacco and the Association as to how these equities are to be handled. The Asso-

ciation has taken the position that the equities could be retained and handled by the Association as the directors might desire, and could be invested in such enterprises as are authorized under the laws of the State of Tennessee, and the articles of incorporation of the Association. Some of the growers and producers of said tobacco have taken the position that the money belonged to them, and should be distributed in cash. Earlier some of the equities were distributed to the growers in cash, and no distribution has been made for any crops for the years 1946, 1947 1948, and 1949, other than approximately one-half of the 1946 equity which was distributed to the growers.

All other agencies administering the support program under contract with the Commodity Credit Corporation have made distribution in cash to the producers as required by the contract and the laws of the United States. The Tennessee Association is the only one that has failed to do so.

As a result of this difference, the complainants have filed suit in their own behalf and representing approximately 7,183 farmers and producers, and the suit is filed in behalf of these persons and in behalf of all other farmers and producers of tobacco who occupy a similar position.

3—Our Federal Government has, for many years, been interested in seeing that farmers and producers receive an adequate price for agricultural commodities, one of such being tobacco, and with that in mind, the Congress created Commodity Credit Corporation for the handling of the loan support program and this Corporation has, in dealing with tobacco growers, entered into contracts with various Associations and instrumentalities in the tobacco belt for administering the loan support program, and the primary purpose of said operation is to benefit the tobacco producers so that they will receive the benefit of the support program and equitable price for their tobacco. The contracts so entered into carried substantially the following provision:

"All net gains accruing from the sale of tobacco upon which Commodity has loan funds under this agreement shall be distributed on a fair and equitable basis to growers by the association, unless a disposition of such gains other than by distributing to growers is requested by the association and approved by Commodity."

Difference arises between complainants and defendants as to proper construction of the foregoing provision and as to whom the equities arising from the handling of the tobacco belong.

4—All the way through the contract between Commodity Credit Corporation and the Association and under all the laws both Federal and State, it is to be seen that the main purpose has been to protect the individual farmers in the growing and marketing of their tobacco. This has been recognized by the Association through speeches made to the farmers, writing letters, running advertisements and in various other ways.

For the reasons set out in said opinion, the Court is of the opinion and finds that the equities arising from the sale of the producers tobacco under said contract provision and under the Federal law, and now held by the Association belong to the farmers and not to the Association. The Association acts as agent for the Commodity Credit Corporation in making the loans and hold the equities as an agent or trustee of the farmers, or tobacco producers.

The Court is further of the opinion and finds that the farmers or producers who desire to have their equities paid to them in cash are entitled to have this done, and the farmers or producers who desire to leave theirs with the Association for handling by the directors and investing in such projects as they may see fit have the right to do this.

In order to determine the wishes of the producers, the case is referred to the Clerk & Master of this Court who will write a letter to each of the growers substantially as follows:

"The Court, in the case of Ivan Range, et. vs. Tennessee Burley Tobacco Growers Association, et al, has determined that the moneys in the hands of the Tennessee Burley Tobacco Growers Association representing gains, or profits on the sale of your tobacco handled by the Association under contract with the Commodity Credit Corporation belong to the growers of tobacco and that you are entitled to have this money distributed to you in cash as required by the contract if you so desire. If you do not desire it in cash but wish to turn it over to the Association to be handled by the directors as they desire, you may do so.

If you will indicate on the inclosed slip whether you want cash, or whether you wish it to be left with the Association, and sign and return it promptly, I will make my report to the Court accordingly."

Clerk & Master.

This reference is made so that the Clerk & Master may determine and report to the Court

(A) Which farmers and tobacco producers desire to have their funds paid to them in cash, and

(B) which farmers and tobacco producers desire to have their funds left with the Association to be used as a revolving fund, or as desired by the directors of the Association.

The Clerk & Master will write letters to the various farmers or tobacco producers who have equities with the Association, advising them of their rights to have their equity paid in cash, or their right to leave it with the Association.

In order to simplify the handling of the matter for the farmers, the Clerk & Master will attach to said letter a slip perforated so that it can be torn off, carrying the following language:

"(1) I want my equities paid to me in cash ( )
(2) I want my equities left with the Association to be handled as the directors may desire ( )

(8)

Please check in the square opposite the statement which you desire and sign and return to the Clerk & Master in the inclosed stamped addressed envelope."

The Tennessee Association will furnish to the Clerk & Master within 30 days a correct list of the names and address of the growers who have funds in the hands of the Association belonging to them, and the amount thereof. The growers will be notified of such amount by the Clerk & Master.

The injunction heretofore granted will be modified to the extent that the defendant Association will pay to the Clerk & Master an amount covering the expense of printing and mailing said letters, upon the Clerk & Master furnishing a statement of the amount of such expense.

The moneys due all producers who do not answer the letter of the Clerk & Master as a result of incorrect address or for any other cause, will be held in trust by the Association in a separate account under the heading "unclaimed funds" until such producers can be located and their moneys distributed to them. Such funds will be so held until further orders of this Court.

5—Under the amended bill, complainants seek a determination and adjudication of their rights in the gains, or equities arising from the handling of the 1950-1951 and 1952 tobacco crops by the Tennessee Association under contracts with the Commodity Credit Corporation. The Court finds that the contracts for these years were substantially the same as the contracts for the years 1946 to 1949 inclusive, and that each of such contracts carried the provision that all net gains will be distributed to the growers. The Court accordingly holds, adjudges and decrees that all

equities or gains from the 1950 51 and 52 crops belong to the producers and not to the Association and that such funds must be distributed to said producers in cash by the Association when the correct amount thereof is ascertained.

6—The Court holds that the Tennessee Association has the right to handle all of its moneys as the directors of the Association see fit so long as same are handled within the provisions of the by laws, charter powers and the laws of the State of Tennessee. This holding is made due to the fact that the Association has power to deal in farm machinery, seeds, agricultural products, etc., under the laws of the State.

However, as heretofore held, the moneys derived from the operation of the support program are not funds belonging to the Association, but belong to the growers and will be distributed under the provisions of this decree unless the growers turn the moneys belonging to them over to the Association for handling as the directors may desire, in accordance with this decree.

7—The Court further finds that many associations, instrumentalities and agencies have handled the loan support program under contract with Commodity Credit Corporation, and in so far as the record discloses, the Tennessee Association is the only one that has failed to distribute the equities to the producers in cash, particularly applicable to tobacco.

The Commodity Credit Corporation has never at any time, approved any distribution by the Tennessee Association to the producers other than by cash and has never approved any other use of the moneys belonging to the producers.

8—The Court further finds that there has been no such waste or mismanagement by the Association, or its officers of the funds of the Association as will justify a recovery against them, and the cause is dismissed in so far as it seeks any relief or recovery because of said waste or mismanagement.

9 Exceptions to the evidence have been made by complainants and defendants and the Court has noted his ruling on the record as to some of them. All exceptions not specifically ruled upon by the Court and noted in the record are overruled.

The injunction heretofore granted and issued in this cause is dissolved, except as herein before stated and as to an amount of funds sufficient to pay these members who desire their payments in cash.

The costs of the cause will be paid one half by the complainants and one half by the defendants.

Further adjudication of the matters pertaining to the suit is reserved until the report of the Clerk & Master is made pursuant to the reference herein.

Complainants except to that portion of the Court's decree wherein it is held that the producers and the owners who own the equities now in the hands of the Association arising from the sale of their tobacco must request that such equities be paid to them, and to that portion of the decree ordering a reference to the Clerk & Master for the purpose of determining the ones that desire their money distributd to them in cash, and the ones who desire to turn their money over to the Association. Such funds belong to producers and growers, and the Association should be required to make distribution thereof in cash.

Complainants further except to that portion of the decree holding that the moneys and funds of the producers have not been wasted, mismanaged and inapplied by the Association and its officers and that no recovery will be granted on account thereof, and to the action of the Court in dismissing that portion of the bill seeking recovery therefor.

Complainants further except to the action of the Court in modifying or dissolving the injunction heretofore granted, as set out in the decree.

Complainants further except to that portion of the decree taxing them with one-half of the costs of the cause.

Wherefore, and on account of which complainants except and pray a special appeal therefrom to the next term of the Court of appeals sitting at Knoxville, which appeal is granted by the Court upon coreplainants executing an appeal bond within 30 days from this date conditioned as required by law.

The Court being of the opinion that the publications in the FEDERAL REGISTER, which were filed as exhibits to the aforesaid petition and motion of the defendants, are not materal to the issues in the cause, the Court is pleased to and does overrule and disallow said petition and motion, whereupon said defendants again presented said petition in open Court and moved that the Court allow same to be filed, deemed and treated as a petition to rehear, or a petition in the nature of a bill of review. The Court is pleased to, and does, allow said petition and exhibits thereto to be filed as prayed in said motion, but is pleased to and does overrule and disallow the prayer of said petition and motion.

To the actions of the Court in making the findings of fact adverse to it, as set out in the Court's opinion; in overruling their exceptions to the testimony, as set out in the opinion, and in sustaining the objections of complaints to the testimony offered by the defendants, as shown by notations upon the record; in overruling defendants' demurrer to the original bill, and the amendment thereto; in denying defendants' motion to dissolve the temporary injunction herein on Bill and Answer; in adjudging that the complainants and such other members of the defendant Association as may desire shall have the right to receive their retained equities, or savings, in cash; in awarding a reference as hereinbefore set out to determine the names and number of those who desire said payments in cash; in overruling and disallowing the petition and motion of the defendants, as hereinbefore set out; and in denying and disallowing the petition to rehear, or petition in the nature of a bill of review, as hereinbefore set out; the defendants excepted and still except, and pray an appeal to the next term

of the Court of Appeals sitting at Knoxville, Tennessee, which appeal is granted, and said defendants will have thirty days from and after the date of the filing of the final decree in this cause within which to perfect said appeal by filing proper appeal bond.

And, it further appearing to the Court that the record in this cause is very voluminous, upon motion of the defendants it is ORDERED that all exhibits in the cause which are designated to be sent up with the record in appeal may be sent up in their original form, and without the necessity of recopying them for the transcript of the record.

Enter.

S GEO. R. SHEPHERD
Geo. R. Shepherd, *Judge*, Sitting as Chancellor by Interchange and Designation.

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(2) Decree of the Court of Appeals of Tennessee

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN DISTRICT

FROM THE CHANCERY COURT OF GREENE COUNTY
IVAN RANGE, ET AL.

VERSUS

TENNESSEE BURLEY TOBACCO GROWERS ASSOCIATION, ET AL.

DECREE

This cause came on to be heard on the transcript of the record, assignments of error, briefs and argument of counsel and the Court having filed its written opinion containing findings of fact and conclusions of law which opinions are made a part hereof by reference.

It is, therefore, ordered, adjudged and decreed that the Chancellor's decree be and the same is hereby accordingly modified to award complainants a recovery only of the equities due them as individuals and the suit in so far as

it seeks a recovery for the benefit of growers not specifically named in the bill as complainants is dismissed. The injunction will also stand dismissed.

The cause will be remanded for a reference to determine the amounts due complainants, respectively, as individuals and, otherwise, the order of reference ordered by the Chancery Court is vacated.

Both petitions to rehear are denied for the reasons set forth in opinion this day filed.

Complainants and sureties on their appeal bond are taxed with $1050.00 of the cost of making up the transcript and one-half the remaining costs of both courts plus the cost of filing their petition to rehear. Defendant Association and sureties on its appeal bond are taxed with $350.00 of the cost of making up the transcript and the remaining one-half the costs of both courts including the cost of filing its petition to rehear.

Enter:

Presiding Judge

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(3) Judgment of the Supreme Court of Tennessee Denying Certiorari

SUPREME COURT OF TENNESSEE, AT KNOXVILLE

SEPTEMBER TERM, 1956

FILED SEPTEMBER 10, 1956, W. H. EAGLE, *Clerk*
GREENE EQUITY BOTH WRITS DENIED
IVAN RANGE, ET AL.

VS.

TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION, ET AL.

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Greene County, opinion and decree of the Court of Appeals, petitions for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the

petitions for writ of certiorari are not well taken, and said petitions for certiorari are denied.

The petitioner Tennessee Burley Tobacco Growers' Assn., *et al.* and sureties Mark Neas and Edward G. Garland will pay one half costs incident to filing petition for certiorari, and the remaining one half costs incident to filing petition for certiorari will be paid by Ivan Range, *et al.* and sureties W. G. Vann for all of which let execution issue.

(signed) A. B. Neil

Hamilton S. Burnett
Pride Tomlinson

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(4) Judgment of the Supreme Court of Tennessee Denying Petition to Rehear

[Caption Omitted]

[Filed December 27, 1956]

This cause came on to be further heard on the Petition to Rehear and Reply thereto, upon consideration whereof the Court is of opinion that the petition rehear is not well taken and should be denied.

It is therefore ordered and decreed by the Court that the petition to rehear is denied.

Costs on petition to rehear will be paid by the Tennessee Burley Tobacco Growers' Association and Sureties Mark Neas and Edward G. Garland, for which let execution issue.

(signed) A. B. Neil

Alan M. Prewitt
Hamilton S. Burnett

(5) Judgment of the Supreme Court of Tennessee Denying Second Petition to Rehear

[Caption Omitted]

[Filed February 15, 1957]

This cause came on to be further heard on the Second Petition to Rehear and Reply thereto, from a consideration of which the Court is of opinion said Petition to Rehear is not well taken and should be denied.

It is therefore, ordered and adjudged by the Court that the Petition to Rehear is denied.

Costs on petition to rehear will be paid by Tennessee Burley Tobacco Growers' Association, *et als.* and sureties Mark Neas and Edward G. Garland, for which let execution issue.

(signed) A. B. Neil

Alan M. Prewitt
John E. Swepston

APPENDIX C

EXCERPTS FROM THE RECORD SHOWING THE RAISING OF THE FEDERAL QUESTION.

(1) *Respondents' Complaint, Paragraph III, Tr. 11:*

> "The association was so organized that the cost of the tobacco turned over to it would be financed by procuring a loan from the Commodity Credit Corporation, a Governmental agency, created for that purpose—it not being necessary that the Association itself have any money invested in the tobacco being handled. The Association entered into a contract with the Commodity Credit Corporation under the terms of which it had a right to charge the farmer with proper expenses incident to the handling of his tobacco, and the balance, after the deduction of such proper expenditures was to be paid to the farmer."

(2) *Respondents' Amended Complaint, Paragraph 1, Tr. 2113-2115, to follow portion quoted in (1) above:*

"1. Under said contract with the Commodity Credit Corporation, the Tennessee Burley Tobacco Growers Association was constituted an agent and representative of the farmers to administer the price support program. The Association was acting in the capacity of agent for the Commodity Credit Corporation for the benefit of farmers in the Tennessee Tobacco Belt and others who turned their tobacco over to the Association under the price support program. It was specifically set out in said contract the authority vested in the Association for the handling of the farmers' tobacco, the terms and methods of handling, what costs and expense could be incurred what charges could be made, and the manner and disposition of the funds after the particular crop of tobacco covered by the loan was sold. By the terms thereof, it was provided that the costs of handling the tobacco in behalf of the farmers by the Association be paid; that the amount loaned by the Commodity Credit Corporation be repaid, and that all net gains accruing from the sale of tobacco upon which Commodity has loaned funds under this agreement shall be distributed on a fair and equitable basis to growers by the Association unless a disposition of such gains other than by distribution to growers is requested by the Association and approved by the Commodity'. Said provision is contained in all of the contracts entered into between the parties and clearly shows that the Tennessee Burley Tobacco Growers Association was merely acting as agent for and in behalf of the farmers in handling their tobacco. Such contracts are executed between the parties yearly for the years 1946, 1947, 1948, 1949, 1950, 1951 and 1952.

"Under the support program authorized by Act of Congress, Commodity Credit Corporation made loans which were secured by warehouse receipts against the tobacco purchased with money so loaned. These loans were **no** recourse, that is, if the particular crop covered by the loan for any year was sold and the funds resulting were insufficient to pay the costs of administrating

the support program and to repay the loan, the taxpayers of the United States took the loss instead of the farmers. The Tennessee Burley Tobacco Growers Association was merely an agent to administer the support program for the farmers' benefit, and the money derived from the sale of the farmers' tobacco under the support program was in the hands of the Association only in the nature of a trust. The Association had no right to divert said funds and withhold them from the farmers after such costs of handling the tobacco were paid and the loan repaid. It was and is the duty of the Association in its capacity as trustee to pay and distribute said funds to the farmers to whom they belong.

"It is shown in the record by defendant's own testimony that no application or request has ever been made to Commodity Credit Corporation to use the money belonging to the farmers in any way; that Commodity Credit Corporation has never granted any such permission other than to have same distributed to the individual farmer as set out in said contract."

(3) *Petitioners' Demurrer to the Amendment to the Bill, Paragraph III, Tr. 2126-2127:*

"Because there has been no breach of the contracts made and entered into between the Commodity Credit Corporation and the defendant Association. It is true that the contracts provide, in substance, that all net gains accruing from the sale of tobacco upon which Commodity has loaned funds under this agreement shall be 'distributed' on a fair and equitable basis to growers by the Association, unless disposition of such gains other than by distribution to growers is requested by the Association and approved by Commodity. The proof in this case already taken abundantly shows that the word 'distribution', as used in agricultural circles, and in cooperative undertakings, as used by Commodity Credit Corporation, and as contemplated in this contract, is defined as:

(1) Distribution by cash.
(2) Distribution by merchandise.
(3) Distribution by revolving fund certificates.

(4) Distribution by all interim certificates of indebtedness.

(5) Distribution by allocation upon the books and notification to the patrons thereof.

(6) Any other means of distribution recognized by law, custom, and the internal revenue regulations.

"The complainants in this cause, for their own purposes, are undertaking to define the term 'distribution', as used in the contract, to mean distribution by cash. Such is not, and has not been, the definition of the term."

(4). *Petitioners' Answer to the Amended Bill, Paragraph I, Tr. 2128-2134:*

"That under all contracts entered into between the Commodity Credit Corporation and the Tennessee Burley Tobacco Growers' Association, for several years past, there has been incorporated by the Commodity Credit Corporation a provision which, in substance, provides that all net gains accruing from the sale of tobacco upon which Commodity has loaned funds under this agreement shall be distributed upon a fair and equitable basis, to growers, by the Association, unless a disposition of such gains other than by distribution to growers is requested by the Association, and approved by Commodity. These defendants deny that the defendant Association was acting as agent for Commodity Credit Corporation. The contracts did not so provide, and the Association was an independent contracting party. The defendants also deny that the defendant Association acted purely as agent for its members and patrons. It is true that it has this authority, under its marketing agreement, which has been filed as one of the exhibits in this cause, but it has also other and further powers and duties. It is a cooperative Association, formed under the Tennessee Cooperative Marketing statute, and as such it is a legal entity, and the laws applicable to it are the laws applicable to marketing associations. It is as individualistic, and as much a legal entity in its own right as a private corporation for profit, a partnership, or any other legal entity recognized by law.

"The complainants in this cause are not parties to said contract, and no privity of said contract exists by which they might be entitled to allege a breach of said contract, and to obtain relief upon said breach, if a breach had existed.

"The truth is that no breach of said contract has been made. The word 'distribution', as used in said contract, must be defined in accordance with the terms and uses usual and customary in such undertakings. Before the amendment in this cause was filed, it had been shown by many competent witnesses, including one witness who had been a member of the Board of Directors of Commodity Credit Corporation at the time that some of these contracts were executed, that the word 'distribution', as used in this contract, was defined in agricultural circles, in cooperative circles, by Commodity Credit Corporation, and by defendants, upon the advice of top officials in the Department of Agriculture, as meaning:

(1) Distribution by cash.
(2) Distribution by merchandise.
(3) Distribution by revolving fund certificates.
(4) Distribution by ad interim certificates or indebtedness.
(5) Distribution by allocation upon the books of the Association and notification of said allocation to the patrons.

"Any one of the foregoing, along with any other definition generally recognized by the Bureau of Internal Revenue regulations, constitute the accepted definition of the word 'distribution'. The narrow and restrictive definition of the word 'distribution', as sought to be used by the complainants, and those for whom they are fronts, would limit the meaning of the term, and would result in adding to the contract the words 'by cash', after the word 'distribution'. The Commodity Credit Corporation, the other contracting party, has never insisted upon any definition other than that insisted upon by the defendants. Certainly it has never insisted that the definition of the word 'distribution' mean 'distribution by cash'. The proof already taken in this cause, before the filing of this amendment, conclusively shows that cooperatives generally function

by retaining equities over a period of time, and using said equities, or savings, of the members as operating or expansion capital, and that after a lapse of several years the older equities are paid out of the newer equities, so that, as nearly as possible, the producers of agricultural products who are using the services of the cooperative association are the ones who have the current investment in its facilities and capital. This form of financing has been generally recognized, and is accepted as standard procedure. Other associations administering price support upon tobacco, as shown by the proof, have set aside equities into reserve accounts which have not been paid back in cash to the members, but which have been held by the association. The proof shows that the Kentucky Association, which has been held up by the complainants as being an ideal one, set aside $1,500,000.00 out of the 1946 crop to reserves, and did not even allocate it to the credit of any member. The proof in this cause further shows that of all the associations the Tennessee Burley Tobacco Growers' Association is the one association that, throughout the years, has undertaken to actually render services to its members. It has not been content to simply administer price support. It has acquired facilities, it has become strong enough to acquire additional facilities, it has put itself in a competitive position to a point where it could actually render some worth-while service to the tobacco producers in the State in which it serves.

"For several years, Commodity Credit Corporation has been fully conversant with the activities and the operations of the defendant Association, and, at no time, has it ever made the contention that the contract between it and the defendant Association required the defendant Association to distribute its savings in cash. On the other hand, it has recognized and approved the method of operation of the defendant Association.

"The Tennessee statute under which the defendant Association was organized provides that it may establish reserves. There is no limitation upon the reserves which may be established. The marketing agreement executed between the members of the Association provides not only for the establishment of reserves, but of the use of said reserves for the purposes of acquiring facilities.

"All of the equities and savings which have not been distributed in cash by the defendant Association have been distributed to the patrons by allocation upon its books, and by notice to the members. This allocation provided that said equities were passed to reserves, and the notice to the members, and his records upon the books of the Association, show that his equities were held in the reserve account. The use of these funds is entrusted to the discretion of the Board of Directors. The proof already taken in this cause shows that the Directors went to great lengths to determine the wishes of the members and patrons of the Association, and that their decision to utilize said reserves in the expansion of their service facilities was as the result of an overwhelming demand for such action by the members and patrons of the Association. In the final analysis the complainants represent only a negligible number of patrons. They have not shown, and cannot show, any fraud or abuse of discretion by the Board of Directors, and they therefore are not entitled to substitute their judgment for the judgment of the Board of Directors.

"As a matter of fact, the defendant Association did not contest the inclusion in the contract with Commodity Credit Corporation of the provision hereinabove described, for the reason that it intended to, and did, distribute all of its equities to its patrons as soon as such equities were realized. If Commodity Credit Corporation had, upon the execution of any contract, insisted upon the interpretation which the complainants now insist upon in their amended bill, the defendant Association would not have agreed thereto. Commodity Credit Corporation is purely an agency of the Government, created by a statute to make available non-recourse loans. After the loan is paid off as to principal and interest, the mere fact that it is a non-recourse loan negatives any thought or theory that Commodity Credit could control the disposition of the remaining profits, which, in cooperative parlance, are referred to as equities or savings. Under cooperative procedures, these savings always belong to, and are expected to revert to, the patrons, on a fair and equitable basis, at such times, and in such manner, as the Board of Directors may determine. If one, or any

number, of dissatisfied, disgruntled, or improperly influenced patrons of a producer cooperative could file a suit and maintain a cause of action on a theory of a debtor-creditor relationship, irrespective of, and contrary to, the policies developed by the Board of Directors, then no producer cooperative could continue to exist. The enemies of cooperatives, who are legion, would have a suit filed against every cooperative every year, as they are doing in the instant case, and the whole cooperative system of enterprise, provided for and recognized as necessary by the United States, and the laws of the several States, would perish. The pattern which the complainants are seeking to establish in this case would provide, as they would like for it to do, for an end of cooperative endeavor, and an end to any competition by cooperatives or established businesses, be it monopolistic or not."

APPENDIX D

STATUTES INVOLVED

1. Sec. 3816 of the Tennessee Code of 1932 now 43-1834 of the Tennessee Code of 1956, provides as follows:

"**§ 3816. Marketing contracts with association.** The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten (10) years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, or any facilities to be created by the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded and statutory liens, to the association upon delivery. The contract may provide, among other things, that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including interest or dividends on stock, not exceeding eight per cent (8%) per annum, and reserves retiring the stock, if any; and other proper services; and or any other deductions."

2. Sec. 311 of the Agricultural Adjustment Act of 1938, 7 U. S. C. § 1311, provides as follows:

"§ 1311. Legislative finding

"(a) The marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare. Tobacco produced for market is sold on a Nation-wide market and, with its products, moves almost wholly in interstate and foreign commerce from the producer to the ultimate consumer. The farmers producing such commodity are subject in their operations to uncontrollable natural causes, are widely scattered throughout the Nation, in many cases such farmers carry on their farming operations on borrowed money or leased lands, and are not so situated as to be able to organize effectively, as can labor and industry through unions and corporations enjoying Government protection and sanction. For these reasons among others, the farmers are unable without Federal assistance to control effectively the orderly marketing of such commodity with the result that abnormally excessive supplies thereof are produced and dumped indiscriminately on the Nation-wide market.

"(b) The disorderly marketing of such abnormally excessive supplies affects, burdens, and obstructs interstate and foreign commerce by (1) materially affecting the volume of such commodity marketed therein, (2) disrupting the orderly marketing of such commodity therein, (3) reducing the price for such commodity with consequent injury and destruction of interstate and foreign commerce in such commodity, and (4) causing a disparity between the prices for such commodity in interstate and foreign commerce and industrial products therein, with a consequent diminution of the volume of interstate and foreign commerce in industrial products.

"(c) Whenever an abnormally excessive supply of tobacco exists, the marketing of such commodity by the producers thereof directly and substantially affects interstate and foreign commerce in such commodity

and its products, and the operation of the provisions of sections 1311-1314 of this title becomes necessary and appropriate in order to promote, foster, and maintain an orderly flow of such supply in interstate and foreign commerce."

3. Section 4 of the Commodity Credit Corporation Charter Act, 15 U. S. C. § 714b, provides in pertinent part as follows:

"§ 714b. General powers of Corporation

"The Corporation—

"(g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business. State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements."

4. Section 12 of the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714j, provides as follows:

"§ 714j. Utilization of associations and trade facilities.

"The Corporation may, in the conduct of its business, utilize on a contract or fee basis, committees or associations of producers, producer-owned and producer-controlled cooperative associations, and trade facilities."